

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLES ROBERTS, an individual;
and KENNETH MCKAY, an individual,
on behalf of themselves and
others similarly situated,

Plaintiffs,

v.

C.R. ENGLAND, INC., a Utah
corporation; OPPORTUNITY LEASING,
INC., a Utah corporation; and
HORIZON TRUCK SALES AND LEASING,
LLC., a Utah Limited Liability
Corporation,

Defendants.

No. C 11-2586 CW

ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS
PLAINTIFFS' CLAIM
UNDER THE
CALIFORNIA
FRANCHISE
INVESTMENT LAW AND
DEFERRING RULING
ON MOTION TO
TRANSFER VENUE
(Docket No. 18)

Plaintiffs Charles Roberts and Kenneth McKay have brought a
putative class action against Defendants C.R. England, Inc.,
Opportunity Leasing, Inc. and Horizon Truck Sales and Leasing,
LLC, on behalf of themselves and others similarly situated.
Roberts and McKay allege numerous causes of action under
California, Utah and Indiana law, as well as the Federal
Telemarketing and Consumer Fraud and Abuse Prevention Act.

1 Roberts and McKay each entered into two contracts, both of
2 which contain a mandatory forum selection clause that identifies
3 Utah as the required forum. Defendants invoke the forum selection
4 clauses and move to dismiss this action, pursuant to Federal Rules
5 of Civil Procedure 12(b)(1), for lack of subject matter
6 jurisdiction, and (3) for improper venue, and move to dismiss or
7 transfer the action, under Title 28 U.S.C. § 1406(a). In the
8 event that the Court does not dismiss or transfer the case
9 pursuant to the forum selection clauses, Defendants seek to
10 transfer the action for convenience, pursuant to Title 28 U.S.C.
11 § 1404(a). Finally, Defendants move under Federal Rule of Civil
12 Procedure 12(b)(6) to dismiss with prejudice Plaintiffs' claim for
13 violation of the California Franchise Investment Law (CFIL).
14 Plaintiffs oppose the motions.

15
16 Having considered the parties' submissions and oral argument,
17 the Court GRANTS, with leave to amend, Defendants' motion to
18 dismiss Plaintiffs' CFIL claim and defers ruling on the motion to
19 transfer the action. If Plaintiffs make out a CFIL claim, the
20 Court will deny Defendants' motion to transfer, but if they fail
21 to do so, transfer under § 1404(a) and § 1406(a) will be
22 warranted.

23 BACKGROUND

24
25 Plaintiffs' First Amended Complaint alleges that Defendants
26 fraudulently induced them to purchase a business opportunity and
27 claims the following facts.
28

1 Defendants are affiliated transportation industry companies
2 headquartered in Salt Lake City, Utah, with offices and operations
3 in California, Indiana and elsewhere. The two contracts that
4 Plaintiffs entered into were an Independent Contractor Operating
5 Agreement (ICOA) with C.R. England, and a Horizon Truck Sales and
6 Leasing Vehicle Lease Agreement (Truck Leasing Agreement) with
7 Horizon.

8
9 C.R. England provides its customers, which include Wal-Mart,
10 with shipping services, principally transporting temperature-
11 sensitive freight around the country by tractor-trailer. C.R.
12 England uses truck drivers employed directly by the company,
13 driving company-owned trucks, but the majority of goods are
14 transported by drivers who have purchased what the First Amended
15 Complaint refers to as the "Driving Opportunity."

16
17 Defendants advertised the Driving Opportunity nation-wide.
18 After viewing C.R. England's online advertising for work and
19 training, Roberts and McKay contacted the company, and enrolled in
20 its driver training school in Mira Loma, California. Roberts and
21 McKay each paid \$3,000 for the driver training school by taking
22 out a loan from Eagle Atlantic Financial for the full amount, at
23 eighteen percent interest.

24
25 The curriculum at the driving school included the "England
26 Business Guide." During the training, representatives from C.R.
27 England and Horizon discussed employment opportunities with C.R.
28 England, the Driving Opportunity, and comparative income rates

1 under both arrangements. Defendants' representatives sought to
2 persuade the trainees, including Roberts and McKay, to purchase
3 the Driving Opportunity rather than pursue employment with C.R.
4 England. After completing the school and securing their
5 commercial driver's licenses, Roberts and McKay spent
6 approximately ninety days on the road as "back up drivers" for
7 C.R. England, satisfying "Phase I" and "Phase II" of their hands-
8 on training.
9

10 After Phase II, trainees could travel to Salt Lake City, Utah
11 or Burns Harbor, Indiana for additional training and classes.
12 Roberts and McKay received their post-Phase II training in Salt
13 Lake City. There Defendants formally offered Roberts and McKay
14 the Driving Opportunity at issue in this case, described, in part,
15 in a document entitled, "The Horizon Truck Sales and Leasing
16 Independent Contractor Program." 1AC, ¶ 48 and Ex. D. The
17 description stated,
18

19 This program allows you to further your career by
20 becoming an Independent Contractor. You can lease a
21 truck and avoid the hassles and initial expenses of
22 buying a truck . . . Program highlights are:

- 22 • An operating agreement with C.R. England
- 23 • **BEST PAY** in the industry, earn up to \$1.53 per
24 mile . . .
- 25 • Friendly priority dispatch with an average
length of haul of **1,500** miles
- 26 • Successful business plan with mentoring and
support staff

26 Id. (emphasis in original). Roberts and McKay allege that
27 this explanation of the program and other representations by
28

1 Defendants gave fraudulent income projections and expense
2 estimates and concealed the high failure rates of individuals
3 who purchased the Driving Opportunity.

4 At the post-Phase II training, C.R. England and Horizon told
5 Roberts and McKay, who were disinclined to purchase the Driving
6 Opportunity and sought company employment, that no employment
7 positions were available and/or that they had to purchase the
8 Driving Opportunity for a minimum of six months before being
9 considered for employment.
10

11 After Roberts and McKay agreed to purchase the Driving
12 Opportunity, Defendants presented them, for the first time, with
13 the Driving Opportunity contracts, namely the ICOA and Truck
14 Leasing Agreement. According to Plaintiffs' allegations, both
15 contracts "were part of a single transaction and constituted the
16 sale of business opportunities and/or franchises under applicable
17 law," and constituted a franchise under federal law, California
18 law, and Utah law. 1AC ¶ 59. Roberts and McKay entered into the
19 ICOA and Truck Leasing Agreement.
20

21 The ICOA provides that the contractor "shall lease to [C.R.
22 England] and operate the [truck], furnishing drivers and all
23 necessary labor to transport, load and unload, and perform all
24 other services necessary to the movement from origin to
25 destination of, all shipments offered by [C.R. England] and
26 accepted by [the contractor]." 1AC, Ex. E, ¶ 1.A. Under the
27 agreement, C.R. England has "no express or implied obligation" to
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1 make any minimum use of the truck, to use the truck at any
2 particular time or location, or to guarantee any amount of revenue
3 to the contractor. Id. The contractor may refuse any specific
4 shipment offered by C.R. England as long as, in its reasonable
5 judgment, it is nonetheless able to meet the needs of its
6 customers. The ICOA states that a contractor is not required to
7 purchase or rent any products, equipment, or services from C.R.
8 England as a condition of entering into the agreement. 1AC, Ex.
9 E ¶ 1.B.
10

11 According to the ICOA, contractors' "Financial, Managerial,
12 and Operating Responsibilities" include, but are not limited to,
13 (1) selecting and supervising all workers the contractor engages,
14 including ensuring their compliance with C.R. England's safety
15 policies and procedures; (2) selecting, securing, and maintaining
16 the contractor's truck, and deciding when, where, and how
17 maintenance and repairs are to be performed; (3) selecting all
18 routes and refueling stops; (4) scheduling all work hours and rest
19 periods; (5) loading and unloading all freight (if the shipper or
20 consignee does not assume such responsibilities); (6) paying all
21 operating expenses, including all applicable wages earned by
22 persons employed by the contractor, and all expenses of fuel, oil,
23 tires, and other parts and supplies; and (7) obtaining,
24 installing, and operating in each leased truck, at the
25 contractor's sole expense, communications and tracking equipment
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1 technically and functionally compatible with the Qualcomm®
2 OmniTRACS system utilized by C.R. England. 1AC, Ex. E, ¶ 7.

3 Under the ICOA, C.R. England has "exclusive possession,
4 control, and use" of the truck for the duration of the ICOA. 1AC,
5 Ex. E, ¶ 8. "At [the contractor's] request, subject to the terms
6 and conditions of Attachment 12, [C.R. England] may approve
7 certain alternative uses of the [truck] on behalf of other
8 authorized carriers or of shippers." Id.
9

10 Finally, Roberts and McKay allege that Horizon is an alter
11 ego of C.R. England, and C.R. England has designated Horizon as
12 the entity to lease to contractors trucks and other items
13 "necessarily utilized in the Driving Opportunity." 1AC ¶ 28. The
14 Truck Leasing Agreements that Roberts and McKay signed on
15 September 29, 2009 and July 13, 2009, respectively, indicate that
16 they entered into contracts with Opportunity Leasing, Inc., doing
17 business as Horizon Truck Sales and Leasing.¹
18

19 DISCUSSION

20 I. Motion to Dismiss CFIL Claim

21 Defendants challenge Roberts' and McKay's claim under the
22 CFIL. A complaint must contain a "short and plain statement of
23 the claim showing that the pleader is entitled to relief." Fed.
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25 ¹ The Utah corporate and business registration for
26 Opportunity Leasing, Inc., doing business as Horizon Truck Sales
27 and Leasing, expired on August 28, 2008 because a "different
28 entity was created." 1AC, Ex. H at 44-45. Horizon Truck Sales
and Leasing LLC was created on August 28, 2008. 1AC, Ex. H at 42.

1 R. Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
2 state a claim, dismissal is appropriate only when the complaint
3 does not give the defendant fair notice of a legally cognizable
4 claim and the grounds on which it rests. Bell Atl. Corp. v.
5 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
6 complaint is sufficient to state a claim, the court will take all
7 material allegations as true and construe them in the light most
8 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
9 896, 898 (9th Cir. 1986). However, this principle is inapplicable
10 to legal conclusions; "threadbare recitals of the elements of a
11 cause of action, supported by mere conclusory statements," are not
12 taken as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)
13 (citing Twombly, 550 U.S. at 555).

14
15 When granting a motion to dismiss, the court is generally
16 required to grant the plaintiff leave to amend, even if no request
17 to amend the pleading was made, unless amendment would be futile.
18
19 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
20 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
21 amendment would be futile, the court examines whether the
22 complaint could be amended to cure the defect requiring dismissal
23 "without contradicting any of the allegations of [the] original
24 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
25 Cir. 1990).

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27 Although the court is generally confined to consideration of
28 the allegations in the pleadings, when the complaint is

1 accompanied by attached documents, such documents are deemed part
2 of the complaint and may be considered in evaluating the merits of
3 a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d
4 1265, 1267 (9th Cir. 1987).

5 Under the CFIL,

6 (a) "Franchise" means a contract or agreement, either
7 expressed or implied, whether oral or written, between two or
8 more persons by which:

9 (1) A franchisee is granted the right to engage in the
10 business of offering, selling or distributing goods or
11 services under a marketing plan or system prescribed in
12 substantial part by a franchisor; and

13 (2) The operation of the franchisee's business pursuant
14 to such plan or system is substantially associated with
15 the franchisor's trademark, service mark, trade name,
16 logotype, advertising or other commercial symbol
17 designating the franchisor or its affiliate; and

18 (3) The franchisee is required to pay, directly or
19 indirectly, a franchise fee.

20 Cal. Corp. Code § 31005.

21 With regard to the first requirement, East Wind Express v.
22 Airborne Freight Corporation, 95 Wash. App. 98 (1999), is
23 instructive. There, the Washington State Court of Appeals
24 interpreted the definition of a franchise under Washington's
25 franchise law statute, which mirrors the CFIL. Airborne conducted
26 a nation-wide delivery service for packages from pick-up point to
27 destination. After the packages were picked up, they were
28 delivered to a sorting facility and then routed to an ultimate
destination station. Airborne used company employees or
independent contractors to deliver the packages from the
destination station to its customers. Airborne billed the

1 customer and was responsible for the package from pick-up to
2 ultimate destination. East Wind was not entitled to receive any
3 portion of the charges made by Airborne to its shippers. Instead,
4 Airborne paid East Wind based on the average number of packages it
5 carried per day. Id. at 100-101. The contract permitted East
6 Wind to use the Airborne trademarks or tradename on vehicles and
7 driver uniforms and deemed such use an advertising service,
8 compensated by Airborne. The court determined that East Wind was
9 not a franchisee because it did not offer, sell, or distribute
10 transportation services to the customers who shipped goods with
11 Airborne. Id. at 105. Rather, the customers were the customers
12 of Airborne, not of East Wind. Id. at 104.

14 Similarly, in Lads Trucking Company v. Sears, Roebuck and
15 Co., 666 F. Supp. 1418, 1420 (C.D. Cal. 1987), the court
16 explained, "The [franchise] arrangement presupposes the
17 establishment of a business relationship between the franchise and
18 his customer so that the latter looks to the franchisee in matters
19 of complaint for quality of product, etc." Lads contracted with
20 Sears to deliver goods purchased by Sears customers to their
21 homes. Lads was indirectly required to pay a monthly charge
22 exacted for parking Lads trucks on Sears property. The court
23 determined that this was not a franchise.

25 Here, Roberts and McKay contend that C.R. England served as
26 the customer, in addition to being the franchisor. They assert
27 that they purchased a right to sell transportation services to
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1 C.R. England by accepting the ICOA and Truck Leasing Agreement.
2 Defendants argue that such an agreement does not constitute a
3 franchise within the meaning of the CFIL. Roberts and McKay are
4 correct that the CFIL does not specify that one who offers, sells
5 or distributes services to another is not a franchisee of the
6 other. The California legislature could have specified that such
7 an arrangement does not constitute a franchise. For example, the
8 Business Opportunity Rule set forth in the federal Trade
9 Regulation Rules specifies that "[t]he term business opportunity
10 means any continuing commercial relationship created by any
11 arrangement or arrangements whereby: (1) A person (hereinafter
12 'business opportunity purchaser') offers, sells, or distributes to
13 any person other than a 'business opportunity seller' (as
14 hereinafter defined), goods, commodities, or services . . ." 16
15 C.F.R. § 432.7 (emphasis added). Still, the omission, without
16 more, is not a persuasive indication that the legislature intended
17 the statute to cover a business arrangement such as that presented
18 in this case. Such a reading would transform many independent
19 contractor arrangements into franchises. Absent a clearer signal
20 from the legislature, extending the CFIL in the manner Plaintiffs
21 seek is unwarranted.

22 The second element in the definition of a franchise requires
23 that the operation of the franchisee's business pursuant to the
24 franchisor's system is substantially associated with the
25 franchisor's trademark or other commercial symbols. In Lads, the
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1 court rejected the argument that this element was satisfied
2 because Sears required the plaintiff's trucks to be painted a
3 certain color and carry the Sears logo and name. 666 F. Supp. at
4 1420. Similarly, in East Wind the mere use of the purported
5 franchisor's trademarks was not sufficient to satisfy this
6 requirement. Roberts and McKay allege in a conclusory fashion
7 that their business was substantially associated with C.R.
8 England's trade or service mark or logotype. 1AC ¶ 88. They
9 attest, in their supporting declarations, that they each drove a
10 truck and trailer emblazoned with C.R. England's commercial
11 symbols. In addition, the Truck Leasing Agreement prohibits
12 drivers from adding, removing or changing any items affixed to the
13 truck. However, under East Wind and Lads, it is not enough that
14 the trademarks were used or were required to be used.
15

16 Finally, to be a franchisee one must pay, directly or
17 indirectly, a franchise fee. Roberts and McKay claim that they
18 paid a franchise fee by paying Defendants' fees for training,
19 truck rental, computer rental, operational equipment, insurance,
20 signs, maintenance, gas, promotional materials and other items
21 required "for the right to enter the Driving Opportunities." 1AC
22 ¶ 86. However, these payments appear to be for ordinary business
23 expenses that do not constitute a franchise fee. See Thueson v.
24 U-Haul Intern., Inc., 144 Cal. App. 4th 664, 676 (2006) (finding
25 that monthly fee for a telephone line and the cost of a leased
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1 computer system did not constitute a franchise fee). There is no
2 indication that they amount to a disguised franchise fee.

3 Plaintiffs have failed to allege that they were franchisees
4 under the CFIL, warranting dismissal of the CFIL claim. Leave to
5 amend is granted.

6 II. Enforceability of the Forum Selection Clauses

7
8 Roberts and McKay argue that the forum selection clauses in
9 the ICOA and Truck Leasing Agreement should not be enforced. In
10 M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972), the
11 Supreme Court held that a forum selection clause is presumptively
12 valid and should not be set aside unless the parties challenging
13 the clause "clearly show that enforcement would be unreasonable
14 and unjust, or that the clause was invalid for such reasons as
15 fraud or overreaching." A forum selection clause is unreasonable
16 if (1) it was incorporated into the contract as a result of fraud,
17 undue influence, or overweening bargaining power, (2) the selected
18 forum is so gravely difficult and inconvenient that the
19 complaining party will for all practical purposes be deprived of
20 its day in court, or (3) enforcement of the clause would
21 contravene a strong public policy of the forum in which the suit
22 is brought. Richards v. Lloyd's of London, 135 F.3d 1289, 1294
23 (9th Cir. 1997). Roberts and McKay contend that the forum
24 selection clause should be disregarded on the first and third
25 grounds.
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1 In Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th
2 Cir. 2000), the Ninth Circuit concluded that California Business
3 and Professions Code section 20040.5 expresses a strong public
4 policy in favor of protecting California franchisees, such that a
5 provision that requires a California franchisee to resolve claims
6 related to the franchise agreement in a non-California court is
7 unenforceable. At this juncture, Roberts and McKay have not
8 successfully alleged that they purchased a franchise.
9

10 Roberts and McKay contend, in the alternative, that the forum
11 selection clause is unenforceable because it was incorporated into
12 the contract as a result of fraud, undue influence, or overweening
13 bargaining power. Defendants' principal response is that the
14 fraud and undue influence must be specific to the inclusion of the
15 forum selection clause, as opposed to the contract as a whole, and
16 here they are not. Defendants rely on Afram Carriers, Inc. v.
17 Adele Najar VDA De Panta, 145 F.3d 298 (5th Cir. 1998), which held
18 that only when the forum selection clause itself was obtained in
19 contravention of the law will the federal courts disregard it.
20 Afram Carriers involved a family that settled a dispute arising
21 from the father's death from a workplace accident. The Fifth
22 Circuit held that evidence that the settlement contract as a whole
23 was unreasonable was ineffective to show that the forum selection
24 clause specifically was the result of fraud or overreaching. Id.
25 at 301-02.
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1 The Ninth Circuit applied similar reasoning in Richards v.
2 Lloyd's of London, 135 F.3d 1289, 1297 (9th Cir. 1998), rejecting
3 the plaintiffs' claims of fraud because the purported fraud went
4 to the contract as a whole, not to the inclusion of the choice of
5 forum clause itself. The plaintiffs did not allege that Lloyd's
6 misled them as to the legal effect of the choice of forum clause.
7 Id. Nor did they allege that the clause was fraudulently inserted
8 without their knowledge. Id. Accordingly, the Ninth Circuit
9 enforced the forum selection clause.
10

11 Here, Roberts and McKay were not given notice of the forum
12 selection clauses in the ICOA and Truck Leasing Agreements at the
13 time they paid for their driving school, because those contracts
14 were not provided until the post-Phase II training in Salt Lake
15 City. Roberts and McKay assert that Defendants overreached
16 because, had they rejected the ICOA and Truck Leasing Agreement in
17 Salt Lake City, they would have spent thousands of dollars on
18 meaningless training. This contention, however, goes to the
19 contract as a whole and is not specific to the forum selection
20 clause. Therefore, the forum selection clause is not rendered
21 unenforceable on this ground.
22

23 The forum selection clause also survives review for
24 fundamental fairness. In Carnival Cruise Lines, Inc. v. Shute,
25 499 U.S. 585, 595 (1991), the Florida forum selection clause
26 contained in the plaintiffs' passenger ticket was enforceable
27 because the cruise line's principal place of business was in
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1 Florida, many of its cruises departed from and returned to Florida
2 ports, there was no evidence of inclusion of the forum clause by
3 fraud or overreaching, and the plaintiffs conceded that they had
4 been given notice of the clause and, thus, presumably had an
5 opportunity to reject it. Similarly, Defendants' principal place
6 of business is located in Utah. Roberts and McKay, and many
7 others, received training and entered into the ICOA and Truck
8 Leasing Agreement in Salt Lake City. Roberts and McKay had an
9 opportunity to review the ICOA and Truck Leasing Agreement prior
10 to signing those contracts, and, as noted earlier, there are no
11 allegations of fraud specific to the forum selection clause.
12 Accordingly, this case is readily distinguishable from Shute and
13 Corona v. American Hawaii Cruises, Inc., 794 F. Supp. 1005 (D.
14 Haw. 1992).

15
16 Unless Plaintiffs are able to plead a CFIL claim, the forum
17 selection clauses in the ICOA and Truck Leasing Agreement are
18 enforceable and will require the transfer of this action to the
19 District of Utah.

20 21 III. Transfer for Convenience

22 Even if the forum selection clauses were unenforceable, an
23 order transferring the action, pursuant to Title 28 U.S.C.
24 § 1404(a), will be warranted, unless Roberts and McKay
25 successfully amend their complaint to allege a CFIL claim.
26

27 Title 28 U.S.C. § 1404(a) provides, "For the convenience of
28 the parties and witnesses, in the interest of justice, a district

1 court may transfer any civil action to any other district or
2 division where it might have been brought." A district court has
3 broad discretion to adjudicate motions for transfer on a case-by-
4 case basis, considering factors of convenience and fairness. See
5 Stewart Org. Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988); Sparling
6 v. Hoffman Constr. Co., 864 F.2d 635, 639 (9th Cir. 1988). Under
7 section 1404(a), the district court may consider: (1) the location
8 where the relevant agreements were negotiated and executed,
9 (2) the state that is most familiar with the governing law,
10 (3) the plaintiff's choice of forum, (4) the respective parties'
11 contacts with the forum, (5) the contacts relating to the
12 plaintiff's cause of action in the chosen forum, (6) the
13 differences in the costs of litigation in the two fora, (7) the
14 availability of compulsory process to compel attendance of
15 unwilling non-party witnesses, and (8) the ease of access to
16 sources of proof. Jones, 211 F.3d at 498-99. In addition, "the
17 presence of a forum selection clause is a 'significant factor' in
18 the court's § 1404(a) analysis." Id. at 499. However, the
19 relevant public policy of the forum state, although not
20 dispositive, "is at least as significant a factor in § 1404(a)
21 balancing" as the presence of the forum selection clause. Id. at
22 499, 499 n.21. The movant bears the burden of justifying the
23 transfer by a strong showing of inconvenience. Decker Coal v.
24 Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986).
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1 The greatest number of factors supports transferring the case
2 to Utah. The first factor favors Utah because the ICOA and Truck
3 Leasing Agreement were provided and signed in that state. On
4 balance, the fourth factor--the parties' respective contacts with
5 the forum--also favors Utah. Defendants have greater contacts
6 with Utah, where they are headquartered. Although Roberts and
7 McKay live in California, they seek to represent a nation-wide
8 class of drivers, many of whom may not have had contact with this
9 district, but likely have had contact with Utah. The sixth
10 factor, the cost of litigation, appears to favor transfer, as
11 well. Although Roberts, McKay and certain drivers and witnesses
12 live in California, as previously mentioned, they do not
13 necessarily live in this district. The remaining drivers live in
14 locations throughout the United States. Utah is more centrally
15 located than this district. Overall, three factors in the
16 transfer determination favor Utah.
17

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19 The third factor favors this district only slightly because
20 Plaintiffs' choice of forum in this action is entitled to reduced
21 deference because they seek to represent a class. Lou, 834 F.2d
22 at 739. Furthermore, McKay lives outside this district. Forrand
23 v. Fed. Express Corp., 2008 U.S. Dist. LEXIS 10858, *7 (N.D. Cal.)
24 (holding that deference owed to a nonresident plaintiff's choice
25 of forum is "substantially reduced.").
26

27 The remaining factors are neutral. The second factor does
28 not favor either State because Roberts and McKay have brought

1 claims under Utah, Indiana, California and federal law, such that
2 no forum is positioned to be the most familiar with the law
3 governing the case. The fifth factor is neutral because, although
4 the claims arise from contracts entered into while Roberts, McKay
5 and other drivers were in Salt Lake City, the claims are based
6 also on representations made in California and nation-wide. The
7 seventh and eighth factors relate to the availability of
8 compulsory process to compel attendance of unwilling non-party
9 witnesses, and the ease of access to sources of proof. Because
10 the parties have yet to exchange initial disclosures, it is
11 difficult to anticipate what witnesses and evidence will be needed
12 for trial. Moreover, modern technology has made possible the
13 electronic exchange of documents, minimizing the costs associated
14 with transporting documentary evidence, whether from an office in
15 Utah or an office in California. As a result, access to proof and
16 witnesses does not clearly favor California or Utah.

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19 In sum, Defendants have met their substantial burden to
20 demonstrate that transferring this case to Utah is warranted,
21 pursuant to 28 U.S.C. § 1404(a), unless a CFIL claim is properly
22 alleged.

23 CONCLUSION

24 Defendants' motion to dismiss Plaintiffs' CFIL claim is
25 GRANTED with leave to amend. Within ten days from the date of
26 this order, Roberts and McKay may amend their complaint to address
27 the deficiencies in their CFIL claim, if they can do so
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truthfully. Within seven days after they file their amended complaint, Defendants may move to dismiss the claim with a brief not to exceed eight pages. Within seven days after the motion is filed, Roberts and McKay shall respond in a brief not to exceed eight pages. Defendants may submit a four page reply within four days. The Court will take the matter under submission on the papers and will resolve the motion to transfer once it is determined whether Plaintiffs state a cognizable CFIL claim.

IT IS SO ORDERED.

Dated: 11/22/2011


CLAUDIA WILKEN
United States District Judge